

THE CONCEPT OF HUMANITARIAN INTERVENTION AND THE LEGAL ANALYSIS OF THE CASE OF KOSOVO

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ABSTRACT

This study aims to examine the international legal dimension of humanitarian military intervention, with a focus on NATO's intervention in Kosovo as a significant example. From an international law perspective, NATO's intervention in Kosovo represents a case where a regional organization used force for humanitarian purposes in the absence of United Nations (UN) action during a humanitarian crisis. However, this intervention differs from other cases in that it faced opposition and the use of veto power from two permanent members of the UN Security Council, Russia and China. As a result, the Kosovo intervention, carried out without the authorization of the Security Council, sparked a global scholarly debate about the functionality of the UN collective security system. In this regard, the Kosovo intervention represents a precedent in both doctrine and practice. In this context, it is crucial to first examine the concept of humanitarian intervention, the theories related to it, and the legal status of the humanitarian intervention conducted in Kosovo. Therefore, this study relies on international documents, decisions, the founding documents of international organizations, books, and scientific journals, utilizing a literature review method for scientific research. The study is limited to the humanitarian intervention in Kosovo. Consequently, the focus will be on discussing whether the intervention was conducted in accordance with international law.

Keywords: UN, humanitarian intervention, NATO, international law.

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INTRODUCTION

This study will examine the international legal aspect of humanitarian military intervention, using NATO's intervention in Kosovo as a key example. In terms of international law, NATO's intervention in Kosovo demonstrates a scenario where a regional organization employed force for humanitarian purposes in the absence of action from the United Nations (UN) during a humanitarian crisis. However, unlike other instances, this intervention faced opposition from two permanent members of the UN Security Council, Russia and China, who exercised their veto powers. Consequently, the Kosovo intervention, conducted without the Security Council's authorization, has initiated a global scholarly debate regarding the effectiveness of the UN's collective security system. As such, the Kosovo intervention represents a precedent in both doctrine and practice. Some NATO members justified the intervention within the framework of UN Security Council resolutions, arguing for the "implicit authorization" of the Council. Others based their justification on the principle of "humanitarian necessity." However, there are also perspectives that view the Kosovo intervention as a violation of fundamental principles of international law, such as state sovereignty and non-interference in internal affairs. This study will first discuss the historical development of the Kosovo issue and then evaluate the 1999 intervention within the context of the law on the use of force and the concept of humanitarian intervention.

This humanitarian military intervention, which contravenes the UN Charter, raises questions about whether it represents an exceptional legal situation or paves the way for the formation of new legal norms. These questions will be examined doctrinally, incorporating the thoughts and opinions of experts in the field. Additionally, the incidents in Kosovo and the NATO air operations led by the United States will be scrutinized in detail, including military aspects from the perspective of international law, and how these actions were received by the international community will be thoroughly analysed in the study.

A. The Conceptual Framework of Humanitarian Intervention

From a conceptual standpoint, it is crucial to first distinguish between "military intervention" and "humanitarian intervention," as these are inherently different concepts. Military intervention is a broader term that encompasses humanitarian intervention. According to Steven Haines, "Military intervention includes military operations conducted by a single state, two states, or a coalition on land, sea, or air, with or without the consent of the state being intervened in, and with or without the authorization of a competent regional authority or the UN Security Council." (Haines, 2000, s. 94)

Humanitarian intervention refers to the use of force or the threat of force by one or more states within the borders of another state, without the consent of the state being intervened in, to prevent or stop widespread and severe human rights violations. This type of intervention is not aimed at protecting the intervening state's own citizens. What sets humanitarian intervention apart from all other forms of intervention is its primary objective: to rescue and protect individuals who are not citizens of the intervening state. Additionally, it constitutes the only form of intervention that cannot be justified under the right of self-defense, which is the most significant exception to the prohibition on the use of force. (Korbayram, Azam, Hoca, Elif, 2022). This argument is frequently invoked in numerous instances of unilateral use of force. (Keskin, 1998, s. 125-130). Since the establishment of the United Nations in 1945, there have been instances where states have unilaterally resorted to the use of force, citing humanitarian reasons. The doctrine has often evaluated these instances within the context of humanitarian intervention. A notable example of this is India's intervention in Pakistan in 1971, also can cite Vietnam's intervention in Cambodia in 1978 and Tanzania's intervention in Uganda as examples. Funda Keskin contends that "while these interventions might have led to some humanitarian outcomes, it is not accurate to claim that humanitarian concerns were the principal reasons for these interventions. (Funda, 2006/07, s. 56)

In the 1990s, after the Cold War, there were both traditional unilateral humanitarian interventions and examples of humanitarian force authorized by the UN Security Council under Chapter VII of the UN Charter. The Security Council has organized these interventions as part of the collective security system in response to threats to international peace and security. A significant point to highlight is the transition from unilateral humanitarian interventions by individual states to collective

interventions framed as threats to international peace. Some scholars argue that the 1991 intervention in Iraq and the 1999 intervention in Kosovo should be seen as exceptions to the rule, advocating that the use of humanitarian force should be managed collectively under the UN rather than through unilateral measures. (Uğur, 2016, s. 26-27).

However, Professor Keskin provides a dissenting opinion by arguing that, despite the UN Charter's clear prohibition of unilateral interventions, state practices after the Cold War have not changed this legal framework. She does not regard the Cold War-era cases (India/Pakistan, Vietnam/Cambodia, Tanzania/Uganda) or the more recent interventions in 1991 Northern Iraq and 1999 Kosovo as valid arguments for unilateral humanitarian interventions. (Uğur, 2016, s. 57).

Collective interventions intended to halt severe human rights violations and conducted under the authority of the Security Council include the 1992 Somali intervention, the 1994 Rwandan intervention, and the 1994 Haitian intervention. In contrast, the Security Council's actions in Liberia in 1990, Northern Iraq in 1991, Southern Iraq in 1992, and Sierra Leone in 1998 were characterized by the use of force aimed at safeguarding human rights. (Holzgrefe, 2003).

B. Evaluation of Humanitarian Intervention from the Perspective of the United Nations Charter

To regard humanitarian intervention as the use or threat of force to protect a state's citizens from severe human rights violations committed by that state, we must first clarify the concept of force. In international law, 'force' is interpreted in a broad manner. While it can involve political, economic, or military means, within the scope of humanitarian intervention, 'force' is primarily understood as armed force. (Elçin, 2005, p. 658)

The use of force has been regulated most comprehensively and advancedly by the United Nations Charter of 1945. According to Article 2(4) of the Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This provision prohibits the use of force, except in cases of self-defense as regulated in Article 51 of the Charter, until the Security Council intervenes, and in situations involving threats to or breaches of peace and acts of aggression under Chapter VII,

where force may be authorized by the Security Council. Proponents of the legality of humanitarian intervention under international law argue that Article 2(4) prohibits the use of force only when it threatens the territorial integrity or political independence of states. (Hoca, Elif, Korbayram, Azam, 2023). They claim that as long as the use of force does not infringe upon a state's territorial integrity or political independence, it is not prohibited by Article 2(4). Therefore, they contend that humanitarian interventions do not violate Article 2(4). (<http://www.icj-cij.org/cijwww/ccases/ccc/cccframe.htm>). Some authors argue that changes in the legal environment justify accommodating humanitarian intervention as an exception to the prohibition on the use of force in international law. Nonetheless, the exceptions to the prohibition articulated in Article 2(4) of the UN Charter are clearly defined and not open to broad interpretation. The principle of narrowly interpreting exceptions is a fundamental legal principle. The Charter's prohibition against the use of force is a general and broad prohibition, extending beyond just the territorial integrity or political independence of states to include any actions contrary to the purposes of the United Nations. This general prohibition is supported by the 7th paragraph of the preamble to the Charter, which reflects the spirit and historical background of Article 2(4). (Rytter, 2001, s. 129).

The use of force fundamentally conflicts with the objectives of the United Nations Organization. In this regard, Franck's "mitigating cause" argument is relevant. Drawing from post-1945 examples, Franck suggests that UN organs have exhibited a flexible approach in evaluating whether there has been a legal violation and assessing its extent. Franck posits that, just as national legal systems have juries, the international community has a form of political jury. Therefore, even if an intervention contradicts Article 2(4) and international law, the intent and result of addressing a humanitarian crisis may serve as a mitigating factor. (Rytter, 2001). However, issues arise when the international community's decisions are influenced by political instincts and face difficulties in establishing decisive criteria. In this regard, Funda Keskin argues that such practices undermine the concept of "consistent practice," which is a crucial element of customary international law. (Funda, 2006/07, s. 56-57).

The Charter also provides a framework for addressing the need for intervention in cases where international peace and security are threatened. Article 24 of the Charter designates the Security Council as the primary body responsible for maintaining international peace and security. If the Security Council is unable to act, the General Assembly is

empowered to take action. (Uniting for Peace Resolution (Resolution 377 (V)) Adopted by the United Nations General Assembly on November 3, 1950).

Article 1(4) of the UN Charter establishes that a fundamental objective of the United Nations is to serve as a focal point for the coordination of national actions aimed at achieving the Charter's goals. This article articulates the UN's role in harmonizing efforts among nations to accomplish shared objectives, including the promotion of peace and security. Humanitarian intervention not only contravenes the principle of non-use of force outlined in Article 2(4) but also breaches Article 2(7) of the UN Charter. Article 2(7) stipulates: "Nothing in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Article 2(7) embodies the traditional concept of state sovereignty in international law, which asserts that states are entitled to manage their internal and external affairs without external interference and that sovereignty is inviolable under international law. This provision signifies the legal equality of states, their full sovereignty over their territory and political affairs, and the obligation to respect each state's territorial integrity and political independence.

Humanitarian Intervention by Security Council Decision: Multilateralism; if the Security Council, under Article 39 of the UN Charter, determines that human rights violations in a country constitute a threat to peace and authorizes a specific state or a coalition of states to use force in response, there is no doubt about the legality of such an operation. The activation of Chapter VII of the UN Charter by the Security Council in cases of severe human rights violations represents a situation not originally anticipated when the Charter was created. However, the Council has interpreted certain internal conflicts as a "threat to peace" under Article 39. These conflicts can be classified as humanitarian emergencies involving widespread and systematic violations of human rights. Examples of such situations include the 1991 North Iraq, 1992-93 Somalia, 1991-95 Bosnia-Herzegovina, 1994 Rwanda, 1994 Haiti, 1998-99 Kosovo, and 1999 East Timor interventions. In these cases, the Security Council granted authorization for the use of force to states and regional organizations in Somalia, Bosnia-Herzegovina, Rwanda, Haiti, and East Timor. (Funda, 2006/07, s. 53-54).

From a legal perspective, there is no issue with operations that have been authorized. The Security Council already possesses the legal authority to undertake such actions. Therefore, some scholars prefer to use the term "humanitarian enforcement action" rather than "humanitarian intervention." The term "humanitarian intervention" is often reserved for situations where states or regional organizations undertake unilateral actions to end human rights violations without Security Council authorization. (Gelijn, 2006).

One of the most significant features of interventions authorized by the Security Council is that they are part of broader humanitarian relief operations. All these interventions have been carried out with the aim of providing assistance to civilians who have fallen victim to armed conflicts in weak states. This situation represents a significant departure from the examples of humanitarian intervention that were intensely debated during the 1970s. In conclusion, while interventions driven by humanitarian motives and strategic interests may not always yield perfect outcomes, it is evident that at least reasonable efforts have been made. Conversely, when such conditions are not met, there is a clear lack of willingness to take action. (O'Hanlon, 2003, s. 6)

The Responsibility to Protect (R2P): The ICISS Report and the Use of Veto Power: In discussions about the potential solutions to the misuse of the veto power by the five permanent members of the UN Security Council, which impedes humanitarian interventions, the International Commission on Intervention and State Sovereignty (ICISS) Report is of great importance. The Report outlines two main alternatives if the Security Council fails to act: First, the General Assembly could invoke the "Uniting for Peace" procedure to seek support for a military intervention. Even though the General Assembly does not possess direct authority to approve military action, a resolution passed by an overwhelming majority in the General Assembly can confer a high level of legitimacy on the proposed intervention, thus encouraging the Security Council to reassess the situation. (Das, 2008, s. 182-189).

C. International Law Perspective on NATO's Intervention in Kosovo and Associated Debates

The NATO air campaign, codenamed Operation Allied Force, began on March 24, 1999, and continued until June 10, 1999. This military operation was directed by the Commander-in-Chief, Allied Forces Southern Europe (CINCSOUTH). The daily execution of the operation was carried out by the 5th Allied Tactical Air Force Command based in

Vicenza, Italy. The United States contributed the largest military contingent to the operation, but other participating countries included the United Kingdom, Belgium, Canada, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, Spain, and Turkey. Turkey participated with 21 F-16 aircraft, which collectively completed over 2,000 flying hours during the operation. Operation Allied Force was a significant example of NATO's collective military effort and demonstrated the alliance's capacity to conduct a large-scale air campaign in the absence of a UN Security Council resolution. The operation's primary objective was to halt the humanitarian crisis in Kosovo and compel the Federal Republic of Yugoslavia to agree to the terms set out by NATO. (Ahmet, Kasım 2011, s. 47-48).

Humanitarian Intervention versus State Sovereignty; The Kosovo intervention presents a unique legal conundrum within the framework of the United Nations Charter. According to Article 2(4) of the Charter, the use of force is generally prohibited except in two specific circumstances: the right to self-defense as outlined in Article 51 and actions authorized by the Security Council under Chapter VII. However, the NATO intervention in Kosovo did not rest on a Security Council resolution and thus did not constitute a collective security operation under Chapter VII. Additionally, the intervention did not fall under the right of self-defense as stipulated in Article 51. Although NATO operates as a collective defense organization under Article 51, none of its member states were subjected to an armed attack by Yugoslavia. Consequently, the Kosovo intervention did not fit within the established exceptions to the prohibition of the use of force as outlined in the UN Charter. (Uğur, 2016, s. 28-29). The legal basis and legitimacy of NATO's intervention in Kosovo were subjects of significant debate in the UN Security Council in March 1999. During these discussions, several NATO member states referenced certain resolutions adopted under Chapter VII of the UN Charter as a foundation for the intervention. (Lider, 2012, s. 103). One of the pivotal decisions in the context of the Kosovo conflict was UN Security Council Resolution 1160, which was adopted on March 31, 1998. This resolution represents a significant moment in the international response to the escalating crisis in Kosovo. (S/RES/1160 (1998)). Resolution 1160 (1998), adopted by the UN Security Council on March 31, 1998, addressed both the excessive use of force by Serbian security forces and the terrorist attacks carried out by the Kosovo Liberation Army (KLA). The resolution affirmed the

sovereignty and territorial integrity of the Federal Republic of Yugoslavia and was directly grounded in Chapter VII of the UN Charter. (S/PV.3868).

Resolution 1199 (1998), adopted by the UN Security Council on September 23, 1998, is another significant decision addressing the ethnic conflicts in Kosovo. This resolution built upon the framework established by Resolution 1160 and introduced further measures aimed at resolving the humanitarian crisis and addressing violations of international law in the region. (S/RES/1199 (1988)). In Resolution 1199, the Security Council reaffirmed the assessments made in Resolution 1160 and reiterated the necessity of achieving a peaceful resolution to the conflict in Kosovo. However, this resolution places a stronger emphasis on the humanitarian dimensions of the crisis.

The preamble of Resolution 1199 underscores the importance of addressing human rights abuses and violations of international humanitarian law. It highlights the urgency of preventing the occurrence of a full-blown humanitarian disaster, emphasizing the need for immediate action to mitigate the risks faced by civilians in the region. (Uğur, 2016, s. 30).

Another Security Council resolution cited as a basis for NATO's intervention is Resolution 1203, adopted on October 24, 1998. (S/RES/1203 (1988)). Resolution 1203 (1998), like the other resolutions, is grounded in Chapter VII of the UN Charter and is largely similar to Resolution 1199 (1998). However, it diverges from its predecessor by not detailing what additional measures might be taken should the resolution's demands be violated. This omission was likely intended to circumvent a potential veto by Russia or China.

As seen, the examination of these resolutions reveals that none explicitly authorized NATO to use force, and therefore, they do not provide a legal basis for intervention in Kosovo and Yugoslavia. In this regard, Professor Funda Keskin has also expressed the view that these resolutions do not contain provisions for military intervention or implicit authorization. (Funda, 2006/07, s. 58).

The legal legitimacy of this intervention has been a topic of debate among legal scholars. Analysing the statements made by NATO members about the intervention reveals that the approach taken was notably detached from seeking a legal basis within the framework of Security Council resolutions. Rather, this intervention was perceived by many

governments as an ad hoc measure that did not fundamentally alter existing international law. (Daniel, 2002, s. 609-610).

The assessment by the International Independent Commission on Kosovo (IICK) reflects the general perception of the intervention. According to the Commission, the intervention was illegal but legitimate. Its illegality stems from the fact that it was not explicitly authorized by a Security Council resolution. However, its legitimacy is justified by the fact that it was carried out after all diplomatic and peaceful avenues had been exhausted, and it succeeded in liberating a significant portion of the Kosovo population from the oppression of Serbian rule. (The Independent International Commission on Kosova: The Kosovo Report: Conflict International Response, Lesson Learned, 2000).

Cassese's perspective on the Kosovo intervention essentially revolves around the idea that the intervention's partial legitimacy can be justified based on the advancement of human rights norms and the contemporary trends that emerged from the practices of the 1990s. Cassese argues that the international community's approach to humanitarian intervention, despite lacking explicit authorization from the Security Council, could reflect a significant development in international law. He suggests that such interventions, when conducted under specific criteria, might contribute to the evolution of legal principles and impact international law. According to Cassese: "Certain examples of international law violations may, over time, lead to the crystallization of a general legal principle that authorizes armed countermeasures specifically aimed at ending large-scale atrocities that threaten peace and constitute crimes against humanity. This principle could, in effect, represent an exception to the requirement of Security Council authorization for collective enforcement measures under the UN Charter. In other words, this principle would offer a similar interpretative latitude to Article 51 of the Charter, which recognizes the right of self-defense." (Antonio, 1999, s. 23-30)

On June 10, 1999, the UN Security Council adopted Resolution 1244, which retrospectively approved the NATO operation in a controversial manner. Resolution 1244 is based on the terms of the agreement reached between NATO and the Federal Republic of Yugoslavia (FRY) for the cessation of hostilities. By adopting Resolution 1244, the Security Council acknowledged the results of the intervention, leading to the establishment of a new administrative framework in Kosovo

and the deployment of a NATO force. Resolution 1244 established the legal basis for the post-conflict administrative structure in Kosovo by setting up the United Nations Mission in Kosovo (UNMIK) and authorizing the presence of a NATO-led force known as KFOR. The resolution endorsed the principles of the agreement reached to end the NATO bombing campaign and laid the groundwork for the administration of Kosovo under UN supervision and the maintenance of peace and security through the deployment of KFOR. (Haines S, 2009, s. 479).

CONCLUSION

In the context of the Kosovo intervention, the absence of a UN Security Council resolution, the abuse of veto power by Russia and China, the threats to peace posed by Serbian forces, and the severe human rights violations that occurred, as well as the ensuing concerns of genocide, rendered the NATO-led air campaign under US leadership an exceptional case in international law. Despite exhausting all peaceful and diplomatic avenues, the intervention was carried out, and it has remained a unique precedent in international legal discourse. The international community deemed the intervention illegal in a strict legal sense but ethically justifiable, and this precedent has not been replicated in subsequent situations lacking a Security Council resolution. A contemporary example illustrating this issue is the Syrian Civil War, which, like the Kosovo situation, saw the Security Council's inaction due to Russia's veto and Western countries' apathy, resulting in an increasingly dire humanitarian crisis.

In conclusion, it is appropriate to view the Allied Force operation as a unique instance in international law that deviated from established legal norms but was justified on the basis of humanitarian necessity. In other words, while the intervention was legally problematic, it was considered to be a legitimate action. After the Kosovo intervention, the delicate balance that had been maintained in the region for years was disrupted, leading to escalating unrest and instability.

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